

1992

State Farm Fire and Casualty Company v. Brad Edwards and Brandon Geary: Brief of Appellant

Utah Court of Appeals

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THE COURT OF APPEALS

STATE OF UTAH

STATE FARM FIRE AND
CASUALTY COMPANY,

Plaintiff/Respondent,

vs.

BRAD EDWARDS and
BRANDON GEARY,

Defendant/Appellant

*

*

*

*

*

*

Appeal No. 920766-CA

Priority No. 16

BRIEF OF APPELLANT

Appeal from Second Judicial District Court
of Davis County, State of Utah
The Honorable Douglas L. Cornaby, District Court Judge

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IN THE COURT OF APPEALS

STATE OF UTAH

STATE FARM FIRE AND	*	
CASUALTY COMPANY,	*	Appeal No. 920766-CA
Plaintiff/Respondent,	*	
vs.	*	Priority No. 16
BRAD EDWARDS and	*	
BRANDON GEARY,	*	
Defendant/Appellant	*	

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BRIEF OF THE APPELLANT

* * * * *

AUTHORITY CONFERRING JURISDICTION

The Utah Supreme Court has jurisdiction over this matter pursuant to Section 78-2-2(3)(j) of the Utah Code Annotated as amended. This case is subject to transfer to the Court of Appeals pursuant to Section 78-2-2(4) and Section 78-28-3(2)(j) of the Utah Code Annotated as amended.

STATEMENT OF ISSUES

The District Court committed error in granting a Summary Judgment to the plaintiff when there were material issues of fact to be determined at the time of trial.

The District Court committed error in ruling that the plea of guilty entered by Brad Edwards to aggravated assault was conclusive as to whether or not Brad Edwards committed an intentional act and

that even if Brad Edwards did not intend to hit Brandon Geary, he could have expected the results.

STANDARD OF REVIEW

Upon review of a grant of a Motion for Summary Judgment, the Court of Appeals applies the same standard as that applied by the trial court. The appellate court must review the evidence in the light most favorable to the losing party, and affirm only where it appears that there is no genuine dispute as to any material issue of fact or where the moving party is entitled to judgment as a matter of law. The Court of Appeals has a right to review the Conclusions of Law for correctness without according deference to the trial court's legal conclusions. Briggs v. Holcomb, 740 P.2d 281 (Utah Ct. App. 1987); Reeves v. Geigy Pharmaceutical, Inc., 764 P.2d 636 (Utah Ct. App. 1988); and Daniels v. Deseret Fed. Sav. & Loan Ass'n, 771 P.2d 1100 (Utah Ct. App. 1989).

DIMINUTIVE CONSTITUTIONAL PROVISION STATUTES, ORDINANCES OR RULES

Section 76-5-102(1)(c)

(1) Assault is;

(c) An act, committed without unlawful force or violence, that causes or creates a substantial risk of bodily injury to another.

Section 76-5-103(1)(b)

(1) A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he:

(b) Used a dangerous weapon as defined in Section 76-1-601 or other means of force likely to produce death or serious bodily injury.

STATEMENT OF THE CASE

A. Nature of the Case:

This appeal is from a final Order of Judge Douglas L. Cornaby granting the plaintiff/respondent's Motion for Summary Judgment in an action to determine insurance coverage for the acts of Brad Edwards.

B. Course of Proceedings:

On about the 17th day of September, 1990, the plaintiff/respondent, State Farm Fire and Casualty Company, hereinafter referred to as State Farm, filed a Complaint in this action naming Brad Edwards and the appellant, hereinafter referred to as Brandon Geary, as defendants. The insurance company sought a ruling from the court that it was not financially responsible for the actions of Brad Edwards who was covered under a home owner's insurance policy. Brandon Geary filed an Answer to the Complaint. Brad Edwards was not represented by an attorney and did not file an Answer to the Complaint. On the 18th day of April, 1991, Brandon Geary filed a Motion to Intervene on behalf of Brad Edwards with a supporting Memorandum and a Request for Oral Argument. The court did not rule on Brandon Geary's Motion to Intervene and a default was not entered against Brad Edwards. State Farm filed a Motion for Summary Judgment with a supporting Memorandum. Brandon Geary filed a Responsive Memorandum and the matter was argued before the District Court on the 7th day of July, 1992, before Judge Douglas Cornaby. Judge Cornaby granted the State Farm's

Motion for Summary Judgment and entered a Memorandum Decision on July 8, 1992. An Order granting summary judgment was signed by Judge Cornaby in this matter on the 8th day of July, 1992, and filed with the court on the 22nd day of July, 1992.

Brandon Geary filed an appeal in this matter on the 21st day of August, 1992. On November 2, 1992, the Supreme Court entered an Order transferring this case to the Court of Appeals for a disposition.

C. Disposition of Trial Court:

Judge Douglas Cornaby granted State Farm's Motion for Summary Judgment, finding that Brad Edwards' actions were intentional and therefore excluded from the home owner's policy.

DESIGNATION OF PARTIES.

The plaintiff/respondent, State Farm Fire and Casualty Company, shall hereinafter be referred to as State Farm. The defendant/appellant, Brandon Geary, shall hereinafter be referred to as Brandon Geary. The defendant Brad Edwards is not a party to this appeal and will be referred to as Brad Edwards.

STATEMENT OF FACTS

1. On or about the 4th day of September, 1989, Brad Edwards discharged a loaded shotgun in the direction of Brandon Geary, striking him in the chest and upper body.

2. Brad Edwards was charged by the State of Utah with attempted homicide and entered into a plea negotiation with the

State of Utah whereby he plead guilty to an aggravated assault, a third degree felony.

3. On the 24th day of January, 1990, Brad Edwards entered a plea of guilty to aggravated assault and signed a "Statement by Defendant in Advance of Plea of Guilty", a copy of which is attached in the Addendum hereto. At the time Brad Edwards entered his plea, he represented in open court that he did not intentionally shot Brandon Geary, but intended to scare him by shooting in close proximity to him and accidentally struck him with the shot. Brad Edwards stated: ". . . I told him I am pleading guilty to the aggravated assault, but I didn't do it on purpose. I was not pleading guilty to shooting him on purpose. I was taking the best choice." (Deposition of Brad Edwards, Pg. 39, L. 1 - 14).

4. Brandon Geary filed a lawsuit against Brad Edwards in the Davis County District Court on or about the 8th day of May, 1990, identified as Civil No. 900747669 PI.

5. On or about the 17th day of September, 1990, the plaintiff filed a Complaint in this action naming Brad Edwards and Brandon Geary as defendants. Brandon Geary filed an Answer to the Complaint. Brad Edwards was not represented by counsel. Brad Edwards was provided an attorney by State Farm Insurance Company in the civil case referred to in Paragraph 4 hereof. However, said attorney did not file an answer in this action on behalf of Brad Edwards.

6. Brandon Geary filed a Motion to Intervene on behalf of Brad Edwards on the 18th day of April, 1991, with a supporting

Memorandum. To this date there has been no ruling on the Motion to Intervene and the defendant has not been given the opportunity to argue the Motion to Intervene.

7. After having received Memoranda and hearing argument in this case, Judge Douglas L. Cornaby, on July 8, 1992, granted State Farm's Motion for a Summary Judgment and entered a "Ruling on Motion for Summary Judgment, Conclusions and Decree", a copy of which is included in the Addendum hereto.

8. A jury trial was held in the case of Brandon Geary v. Brad Edwards, Civil No. 900747669 PI before Judge Jon M. Memmott on the 21st day of October, 1992. At the conclusion of the trial, Judge Memmott granted Brad Edwards' Motion to dismiss Brandon Geary's cause of action for an intentional tort. The issue of negligence was submitted to the jury and they returned a verdict finding that Brad Edwards was negligent and that his negligence constituted 90 percent of the fault. A copy of the jury verdict is enclosed in the Addendum hereto.

SUMMARY OF ARGUMENT

1. A summary judgment should not be granted if there is any genuine issue as to any material fact. There are issues of disputed fact in this case; and, therefore, the court committed error in granting a summary judgment.

2. The court committed error in concluding that Brad Edwards intended to shoot and/or injure Brandon Geary because of a plea Brad Edwards entered to an aggravated assault charge. Aggravated

assault can consist of using force which creates a substantial risk of bodily injury. Brad Edwards testified that he did not intend to shoot or harm Brandon Geary; therefore, an issue of fact existed which should have been submitted to the trier of fact.

3. Brad Edwards testified that he did not intend to shoot and did not expect or intend to injure Brandon Geary. The trial court committed error in ruling that Brad Edwards could have expected the results because he intentionally picked up the gun, pointed it, and fired it. An exclusion clause in an insurance policy should be construed against the insurance company and the company has the burden of demonstrating that Brad Edwards intended to shoot and expected or intended to injure Brandon Geary.

ARGUMENT

POINT I

STANDARD OF PROOF

Under Rule 56 of the Utah Rules of Civil Procedure, on a summary judgment motion the plaintiff has the burden of proving to the trial court that no genuine issue as to any material fact exists and that it is entitled to summary judgment as a matter of law. Frisbee v. Kay & Kay Construction Co., 676 P.2d 384 (Utah 1984). Furthermore, a motion for summary judgment must be viewed in the light most favorable to the opposing party. Reliable Furniture Co. v. Fidelity & Guaranty Insurance Underwriters, 398 P.2d 685 (Utah 1965). Finally, courts should be reluctant to

invoke the remedy of summary judgment. Brandt v. Springville Banking Co., 353 P.2d 460 (Utah 1960).

The appellant alleges that there was a material issue of fact as to whether or not Brad Edwards intended to shoot the appellant and whether or not Brad Edwards' actions could be expected to cause bodily injury to the appellant. The evidence presented before the trial court in the form of a deposition taken of Brad Edwards clearly raised disputed issues of fact which had to be viewed in a light most favorable to the appellant. Consequently, the court committed error in granting a summary judgment and denying the appellant an opportunity for a trial on those issues.

POINT II

BRAD EDWARDS' PLEA OF GUILTY TO AGGRAVATED ASSAULT WAS NOT DETERMINATIVE OF THE ISSUE OF INTENT.

State Farm, in its motion before the District Court, argued that the District Court should assume that Brad Edwards shot Brandon Geary intentionally because of the plea he entered to aggravated assault. Judge Douglas Cornaby, in his Memorandum Decision granting summary judgment, stated: "Mr. Edwards plead guilty to intentionally injuring Mr. Geary. He cannot now explain away that plea." (Pg 1, "Ruling on Motion for Summary Judgment, Conclusions, and Decree"). Brad Edwards was originally charged with attempted homicide, a second degree felony. That plea was negotiated down to a charge of aggravated assault, a third degree felony. On the 24th day of January, 1990, Brad Edwards entered a plea to the aggravated assault and signed a "Statement by Defendant

in Advance of Plea", a copy of which is enclosed in the Addendum hereto.

Brad Edwards, in his deposition, testified that he plead guilty to the reduce charge not because he intended to shoot Brandon Geary, but because he thought it was the best option available to him. Brad Edwards testified that he told the judge at the time he entered the plea that he did not intend to shoot Brandon Geary. In spite of the statement, the judge accepted his plea to the lesser offense of aggravated assault. Brad Edwards, at the time of sentencing, again told the judge that he did not intend to shoot Brandon Geary. (Deposition of Brad Edwards, Pg. 37, L. 14-25; Pg. 38, L. 4-10; and Pg. 39, L. 1-14.) On Page 39 of Brad Edwards' deposition he stated:

A. Yeah, that's correct. I told him I'm pleading guilty to the aggravated assault but I didn't do it on purpose. I wasn't pleading guilty to shooting him on purpose. I was taking the best choice.

Section 75-5-102 of the Utah Code Annotated defines assault as:

- (1) Assault is:
 - (a) an attempt, with unlawful force or violence, to do bodily injury to another;
 - (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or
 - (c) an act, committed with unlawful force or violence, that causes or creates a substantial risk of bodily injury to another.

Section 76-5-103 of the Utah Code Annotated defines aggravated assault as:

- (1) A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he:

(a) intentionally causes serious bodily injury to another; or

(b) uses a dangerous weapon as defined in Section 76-1-601 or other means or force likely to produce death or serious bodily injury.

Under Utah State Law in effect at the time Brad Edwards entered his plea of guilty, he could be guilty of an aggravated assault if he committed an act with unlawful force or violence that causes or created a substantial risk of bodily injury to another. The State law did not require that Brad Edwards intend to cause bodily injury to another. Paragraph 4 of the "Statement by Defendant in Advance of Plea" signed by Brad Edwards states that the elements of the statements prove are:

(1) an attempt, with unlawful force or violence, to do bodily injury to another; and

(b) intentionally causes serious bodily injury to another.

The elements quoted above could constitute the act of aggravated assault. However, the defendant could be guilty of aggravated assault if he created a substantial risk of bodily injury to another. Brad Edwards, after signing the statement, told the trial court that he did not intend to shoot or hit Brandon Geary. After receiving that explanation from Brad Edwards, notwithstanding the language of the "Statement", the trial court accepted his plea to the aggravated assault. This was clearly permissible by the court since Brad Edwards could be found guilty of the crime even if he did not intend to shoot or hit Brandon Geary. Therefore, it is inappropriate for Judge Cornaby to conclude that the plea of guilty entered by Brad Edwards was conclusive as to the issue of his intent, and that Brad Edwards

could not explain away that plea. Judge Cornaby had no way of knowing whether or not Judge Page, accepted the plea knowing that Brad Edwards could be guilty of aggravated assault even though he may not have intended to shoot and/or hit Brandon Geary.

Neither party was able to supply to the trial court a transcript of the proceedings held before Judge Page when Brad Edwards entered his plea. Judge Page's court reporter, Hal Rees, died of cancer. Other court reporters were not able to decipher his notes so as to produce such a transcript. Consequently, the only evidence that Judge Cornaby had was the statement by the defendant referred to herein and the deposition of Brad Edwards.

POINT III

**BRAD EDWARDS DID NOT INTENTIONALLY SHOT BRANDON GEARY
AND DID NOT EXPECT OR INTEND THAT BRANDON GEARY BE INJURED
BY THE SHOTGUN BLAST.**

The sole basis for State Farm's Motion for Summary Judgment was an allegation that Brad Edwards intentionally shot Brandon Geary. The opening paragraph of State Farm's memorandum in support of its' motion for summary judgment stated:

Case law is clear in holding that an intentional shooting falls within the intentional injury exclusion clause of insurance policies. In the present case, Brad Edwards has admitted he intentionally shot Brandon Geary. Therefore, Brad Edwards' actions are not covered by his parents' homeowner's policy which contains an intentional injury exclusion clause.

Brad Edwards' actions and intent are clearly set forth in his deposition. Brad Edwards testified he fired the gun twice. The first time he fired a warning shot to scare off Brandon Geary,

aiming the shot at the ground. In this regard Brad Edwards stated:

Q. You then take the gun and do what with it?

A. Point it out the window. Not at them, but at a direction, and I fired a warning shot to scare them off.

Q. Where did you think the warning shot went?

A. It went in the ground.

(Deposition of Brad Edwards, P. 30, L. 4-8)

A second shot was then fired. Regarding this shot, Brad Edwards stated:

Q. Did you see him look over his rear shoulder?

A. No, I didn't. And I shot another shot.

Q. An what was your intent of that shot?

A. To scare them away.

Q. And where you aiming the shot?

A. The same place.

(Deposition of Brad Edwards, P. 31, L. 11-16)

Brad Edwards was specifically asked if he intended to shot Brandon Geary. He stated:

Q. So it was not your intent at the time that you actually struck Brandon to hit him?

A. No, I was just trying to scare him like they were scaring me. . . .

(Deposition of Brad Edwards, P. 35, L. 10-22)

Q. . . . What I am going to ask you, at the time that you fired the shotgun that actually hit Brandon Geary, was it your intent to strike him with the pellets from the shotgun?

A. No sir.

Q. What was your intent at that time?

A. To scare him away like they were scaring me.

(Deposition of Brad Edwards, P. 7, L. 10-17)

Brad Edwards also testified that he did not believe that the shotgun blast would travel far enough to hit Brandon Geary.

(Deposition of Brad Edwards, P. 48, L. 7-18).

Counsel for State Farm questioned Brad Edwards and asked him whether he intentionally fired the gun. Brad Edwards responded as follows:

Q. And you intentionally fired the Gun? Whether you tried to him them or not, you intentionally fired the gun; is that correct?

A. Intentionally in another direction, yes, sir

. . . .

A. Well, if I shot the gun, yeah, that's correct. I aimed the gun out the window in an intention to scare them, which I shot the gun intentionally, but not to hurt, to scare.

(Deposition of Brad Edwards, P. 53, L. 12-25).

Similar statements were also made by Brad Edwards in his deposition on Page 70, Line 13, and Page 76, Lines 10 through 15.

Brandon Geary filed a lawsuit against Brad Edwards on the 8th day of May, 1990, identified as Civil No. 900747669 PI. In that lawsuit Brandon Geary alleged that Brad Edwards was negligent in firing the shot gun in his direction and that the negligence was the proximate cause of Brandon Geary's injury. Brandon Geary also alleged that the acts of Brad Edwards were intentional. A jury trial was held on this matter on the 21st day of October, 1992. Judge Jon Memmott, the District Court Judge, dismissed Brandon

Geary's action for an intentional tort at the conclusion of the evidence, upon a motion by Brandon Geary's attorney. The issue of negligence was submitted to the jury, who concluded that Brad Edwards was negligent in his act and that his negligence constituted 90 percent of the fault. (A copy of the Jury Verdict is enclosed in the Addendum hereto).

State Farm claims that liability coverage does not apply to bodily injury or property damage which "(1) which is either expected or intended by an insured or (2) any person or property which is the result of willful and malicious acts of the insured." Judge Cornaby ruled that the acts of Brad Edwards were excluded because:

He intentionally picked up a loaded shot gun. He intentionally pointed it in the direction of Mr. Geary. He intentionally fired. The first shot missed. He intentionally fired a second shot which hit Mr. Geary . . . Even if Mr. Edwards had not 'intended' to hit Mr. Geary, he could have 'expected' that it would happen considering his intentional actions

It is the position of Brandon Geary that Judge Cornaby erred in concluding that intentionally picking up a shot gun and firing it in the direction of Brandon Geary is sufficient to meet the language of the exclusion. The trial court had no evidence before it with the exception of the deposition of Brad Edwards and the "Statement by Defendant in Advance of Plea" previously referred to herein. Given the statements of Brad Edwards in his deposition, there was clearly an issue of fact as to whether or not Mr. Edwards intended to hit Mr. Geary and/or expected that his acts would injury Mr. Geary.

The exclusion clause relied upon by State Farm has been the subject of litigation in a number of cases. In the case of Safeco Insurance Company v. McGrath, 817 P.2d 861 (Wash. App. 1991), the defendant and victim were in an altercation. The victim approached the defendant in a menacing manner, at which time the defendant shot the victim in the neck. The defendant claimed that he did not intend to injure the victim, but only to prevent the victim's advance and that he was not aiming at the victim, but in his general direction. The court stated that for the insurance policy exclusion to apply, the injured must intend both the physical act and the resulting injury to the victim. The court stated:

. . . Lumbermen makes the same contention as to McGrath's testimony and affidavit; namely, that it establishes there is no factual issue as to McGrath's intent to injure Hayes. We disagree. The record contains the following statements, "I fired the gun in their direction to stop them, never intending to shot him or hit him or anything like that." "I did not expect to hit anybody." These statements, if believed, as we must on summary judgment, raise a material issue of fact as to McGrath's intent, regardless of other statements suggesting he did intend to injure. We acknowledge that read as a whole McGrath's affidavit and testimony supports a compelling and persuasive argument that McGrath did, in fact, intend to injure. However, we are not the trier of the fact and we are unable to say that reasonable minds could not reach a different conclusion, and, hence, summary judgment is inappropriate.

In the case of Allstate Insurance Company v. Steinemer, 723 F.2d 873 (11th Cir. 1984), a summary judgment was granted to the insurance company. The summary judgment was overturned by the Court of Appeals. Two boys had been playing with a BB gun and one of the boys was shot and hit in the eye. The defendant stated that he intended to hit the victim with the BB so that he could feel the

sting, but that he did not intend to harm him. The Court of Appeals found that there was a genuine issue of material fact as to whether the insured intended to cause harm to the victim. The court stated:

Under the majority rule the exclusion applies only if the insured intended to do a particular act, AND intended to do some harm, even if the harm actually done was radically different from that intended On the other hand, . . . 'an intentional injury' exclusion will not apply if the insured intentionally does an act, but has no intent to commit harm, even if the act involves foreseeable consequences of great harm or even amounts to gross or culpable negligence. Pg. 875.

In Vanguard Insurance Company v. Cantrell, 503 P.2d 962 (Az. App. 1972), the court dealt with an insurance policy exclusion for expected or intended injuries. In that case, the defendant robbed a drive-up liquor store, and as he drove off he fired a shot over his shoulder in the direction of the store to scare the victim and to make him duck so that he would not recognize the defendant or the defendant's car. The shot struck the victim in his eye. The trial court found that the defendant had not intended to cause harm even though he intended the act of shooting; and that, therefore, the insurance policy exclusion did not apply and the insurance company was found liable under its home owner's policy.

The case of Fire Insurance Exchange v. Berray, 694 P.2d 259 (Az. App. 1983) involved an insurance policy which had an exclusion for intentional acts of the insured. Two parties were involved in an exchange of words and a fight. The defendant warned the victim not to come any closer, and when that warning was ignored, took a gun from his van and shot the victim. The Arizona Court held that

the exclusion language in the insurance policy must be construed in favor of the insured and against the insurance company. The court went on to state that the insured, the defendant, intentionally caused harm to the victim within the meaning of the exclusion clause of the home owner's policy, but that he did not commit an intentional act within the meaning of the exclusion clause where he acted in self-defense. The court reviewed the case of Clark v. Allstate Insurance Company, 529 P.2d 1195 (Az. App. 1975) where one high school student struck another in the face, injuring him. The court stated that if the high school student had alleged that the striking was accidental and the blow itself was unintentional, then summary judgment would not be appropriate since there would have been a material fact to be determined at trial.

It seems clear from the cases cited that an exclusionary clause in an insurance policy is to be construed in favor of the insured and that there must be no disputed issues as to the intent of the insured to commit an act and to cause an injury by the commission of that act. Brad Edwards has testified that he fired because he was fearful for his own safety and that he did not intend to hit Brandon Geary or to injure him. Consequently, there is a material issue of fact to be determined by the trier of fact.

CONCLUSION

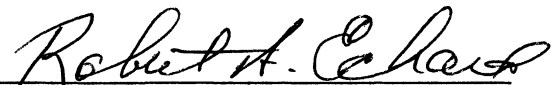
The trial court committed error in granting State Farm's Motion for Summary Judgment. There was a material issue of fact as to whether or not Brad Edwards intended to shoot at, strike,

and/or injure Brandon Geary. The trial court could not conclude as a matter of law from Brad Edwards plea to aggravated assault that he intended to shoot Brandon Geary and/or injure him. Likewise, the court committed error in concluding that even if Brad Edwards did not intend to hit Brandon Geary, he could have "expected" the results.

Under Utah Law, aggravated assault can consist of using unlawful force which causes a substantial risk of injury. An exclusion clause in a homeowner's policy should be construed in favor of the insured and the insurance company should have the burden of proving that Brad Edwards intended to shoot Brandon Geary and to injure him. Since the evidence before the court clearly raised a factual issue as to whether Brad Edwards intended to shoot Brandon Geary and/or intended to injure him, summary judgment was not appropriate.

Wherefore, Brandon Geary respectfully requests that the summary judgment be reversed and the matter remanded back to the District Court for a trial.

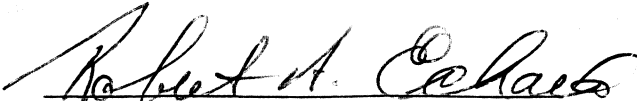
RESPECTFULLY SUBMITTED this 8 day of December, 1992.


ROBERT A. ECHARD
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify four (4) true and correct copies of the foregoing BRIEF OF APPELLANT was mailed, postage prepaid, this 8

day of December, 1992 to Lowell V. Smith, Daniel D. Andersen,
Attorneys for Respondant, P. O. Box 2970, Salt Lake City, UT 84110-
2970.


ROBERT A. ECHARD
Attorney for Appellant

A D D E N D U M

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE
COUNTY OF DAVIS, STATE OF UTAH

JUL 09 1992

STATE FARM FIRE & CASUALTY CO.,)
 Plaintiff,)
 vs.)
BRAD EDWARDS, et al.,)
 Defendants.)
 Civil No. 920700021

The plaintiff's motion for summary judgment was before the Court for oral argument. The plaintiff's position was argued by Daniel D. Anderson and the defendants' position was argued by Robert A. Echard. After oral argument the Court took the motion under advisement.

The plaintiff's motion for summary judgment is granted.

The defendant is attempting to collect through a homeowners insurance policy. The policy has an intentional act exclusion.

The defendant, Brad Edwards, plead guilty to a negotiated charge of aggravated assault and was sentenced to the Utah State Prison. He signed a "statement by defendant in advance of plea of guilty." The elements of aggravated assault were detailed therein, to-wit, "(1) An attempt, with unlawful force or violence, to do bodily injury to another; and (b) Intentionally causes serious bodily injury to another." He was represented by an attorney. He now says in his deposition that he only intended to scare the other party away. In fact, he pointed a shotgun and fired in the direction of Brandon N. Geary who was hit in the face, neck, and chest with 132 pellets.

Mr. Edwards plead guilty to intentionally injuring Mr. Geary. He cannot now explain away that plea.

Even if the fact finder believed that Mr. Edwards did not intend to injure Mr. Geary, the acts of Mr. Edwards were

intentional. He intentionally picked up a loaded shotgun. He intentionally pointed it in the direction of Mr. Geary. He intentionally fired. The first shot missed. He intentionally fired a second shot which hit Mr. Geary.

The insurance policy provides that "medicals do not apply to...bodily injury...which is either expected or intended...or...which is the result of willful and malicious acts of an insured..."

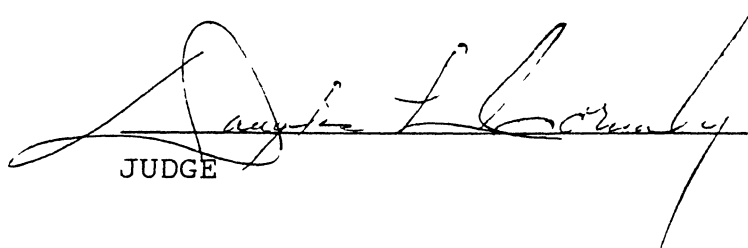
Even if Mr. Edwards had not "intended" to hit Mr. Geary, he could have "expected" that it would happen considering his intentional actions.

The plaintiff is entitled to summary judgment in its declaratory judgment action.

The plaintiff is directed to draw a formal order consistent with this ruling.

Dated July 8, 1992.

BY THE COURT:


JUDGE

Certificate of Mailing:

This is to certify that the undersigned mailed a true and correct copy of the foregoing Ruling to:

Lowell V. Smith
Daniel D. Andersen
P. O. Box 2970
SLC, UT 84110-2970

Robert A. Echard
Key Bank Bldg., Suite 200
2491 Washington Blvd.
Ogden, UT 84401

Dated this 8th day of July 1992.

Kathy Patten
Deputy Clerk

Lowell V. Smith, #3006
Daniel D. Andersen, #5907
HANSON, EPPERSON & SMITH
A Professional Corporation
Attorneys for Plaintiff
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, Utah 84110-2970
(801) 363-7611

JUL 22 4 29 PM '92

CLERK OF COURT
BY DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
DAVIS COUNTY, STATE OF UTAH

STATE FARM FIRE AND	:	
CASUALTY COMPANY,	:	
	:	
Plaintiff,	:	ORDER
	:	
v.	:	
	:	
BRAD EDWARDS and	:	Civil No: 920700021 CV
BRANDON N. GEARY,	:	
	:	Judge Douglas Cornaby
Defendants.	:	

Plaintiff's Motion for Summary Judgment came before this Court for oral argument on July 7, 1992. Plaintiff was represented by its attorneys Lowell V. Smith and Daniel D. Andersen. Defendant, Brandon N. Geary, was represented by his attorney Robert A. Echard. Defendant Brad Edwards did not appear either through counsel nor in person. Oral argument was presented to the Court. The Court took the Motion under advisement.

Based on the memoranda of law submitted by the parties and on the oral argument, and being fully advised,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff's Motion for Summary Judgment is granted;

0140716

2. The acts of Brad Edwards are found to fall within the exclusionary coverage of the homeowner's policy which states:

Coverage L [Personal Liability] and Coverage M [Medical Payments to Others] to not apply to:

- A. Bodily injury or property damage:
(1) Which is either expected or intended by an insured; or
(2) To any person or property which is the result of willful and malicious acts of an insured.

3. Plaintiff, State Farm Fire and Casualty Company, owes no duty of indemnification for the acts of Brad Edwards and the claims of Brandon N. Geary, as set forth in the underlying action, Geary v. Edwards, Case No. 900747669 PI.

4. Plaintiff, State Farm Fire and Casualty Company, owes no duty of defense to Brad Edwards in the underlying action, Geary v. Edwards, Case No. 900747669 PI.

DATED this 22 day of July, 1992.

BY THE COURT:

Richard S. Page
HONORABLE DOUGLAS L. CORNABY
DISTRICT COURT JUDGE

STATE OF UTAH)
COUNTY OF DAVIS.) ss.
I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT
OF DAVIS COUNTY, UTAH, DO HEREBY CERTIFY THAT
THE ANNEXED AND FOREGOING IS A TRUE AND FULL
COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE
AS SUCH CLERK.

STATE
WITNESS MY HAND AND SEAL OF SAID OFFICE
THIS 4th DAY OF December, 19 92
PAULA CARR, CLERK
BY: [Signature]

CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand delivered this
10th day of July, 1992, a true and correct copy of the foregoing
to the following:

Robert A. Echard
ROBERT ECHARD & ASSOCIATES
Key Bank Building, Suite 200
2491 Washington Blvd
Ogden, Utah 84401
Attorney for Defendant Geary

Bob Paulson

KEVIN P. SULLIVAN (#3871) of
FARR, KAUFMAN, HAMILTON,
SULLIVAN, GORMAN & PERKINS
Attorneys for Defendant
205 26th Street, Suite 34
Bamberger Square Building
Ogden, UT 84401
Telephone: (801) 394-5526

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

STATE OF UTAH,
Plaintiff,

vs.

BRAD EDWARDS,
Defendant.

STATEMENT BY DEFENDANT IN
ADVANCE OF PLEA OF GUILTY

Case No. 891706590 FS
JUDGE: RODNEY S. PAGE

I hereby acknowledge and certify that I have been advised of and that I understand the following facts and rights, and that I have had the assistance of counsel in reviewing, explaining, and completing this form:

1. The nature of the charges against me have been explained. I have had an opportunity to discuss the nature of the charges with my attorney, and I understand the charges and the elements which the government is required to prove beyond a reasonable doubt.

2. As explained, I am charged with crimes in ^{Davis} ~~Weber~~ County as follows:

<u>CRIME</u>	<u>CLASS OR DEGREE</u>	<u>STATUTORY PENALTY</u>
Attempted Homicide	2nd Degree	1-15; \$10,000 an additional 0-5 years to run consecutively

FILED

STATE OF UTAH V. EDWARDS - Case No. 891706590
Statement in Advance of Plea

3. It has been discussed with the prosecutor the possibility of entering a plea of guilty to the charges as follows:

<u>CRIME</u>	<u>CLASS OR DEGREE</u>	<u>STATUTORY PENALTY</u>
Aggravated Assault	3rd Degree	0-5; \$5,000

4. I understand that the elements of the offense the State must prove beyond a reasonable doubt are:

- (1) An attempt, with unlawful force or violence, to do bodily injury to another; and
- (b) Intentionally causes serious bodily injury to another.

5. I know that I can be represented by an attorney at every stage of the proceeding, and I have retained the law firm of FARR, KAUFMAN, HAMILTON, SULLIVAN, GORMAN & PERKINS to represent me in this matter.

6. I know that I have a right to plead "not guilty", and I know that if I do plead "not guilty", I can persist in that plea.

7. I know that I have a right to a trial by jury, and that if I were to stand trial by a jury:

- (a) I have a right to the assistance of counsel at every stage of the proceeding.
- (b) I have a right to see and observe the witnesses who testify against me.

SULLIVAN, GORMAN & PERKINS
ATTORNEYS AT LAW
205 26TH STREET, SUITE 34
BAMBERGER SQUARE BUILDING
OGDEN, UTAH 84401

STATE OF UTAH V. EDWARDS - Case No. 891706590
Statement in Advance of Plea

(c) My attorney can cross-examine all witnesses who testify against me.

(d) I can call such witnesses as I desire, and I can obtain subpoenas to require the attendance and testimony of those witnesses.

(e) I cannot be forced to incriminate myself and I do not have to testify at any trial.

(f) If I do not want to testify, the jury will be told that no inference adverse to me may be drawn from my failure to testify.

(g) The government must prove each and every element of the offense(s) charged against me beyond a reasonable doubt.

(h) It requires a unanimous verdict of a jury to convict me.

(i) If I were to be convicted, I can appeal, and if I cannot afford to appeal, the government will pay the costs of the appeal including the services of appointed counsel.

8. I have discussed my constitutional rights to a jury trial with my attorney. I understand all the rights listed in paragraphs 7(a) through 7(i), and it is my desire to waive those rights.

B. E.
Defendant's Initials

ATTORNEYS AT LAW
205 26111 STREET, SUITE 34
BAMBERGER SQUARE BUILDING
OGDEN, UTAH 84401

STATE OF UTAH V. EDWARDS - Case No. 891706590
Statement in Advance of Plea

9. Under a plea of guilty, there will not be a trial of any kind, and I am waiving my rights and admitting that I am guilty of the crime to which my plea is entered.

10. I hereby acknowledge and waive the following rights:

- (a) I waive the right to have a jury trial.
- (b) I waive the right to see and observe the witnesses who testify against me.
- (c) I waive the right to have my attorney cross-examine the State witnesses.
- (d) I waive the right to put on a defense and call witnesses on my behalf.
- (e) I waive my right against self-incrimination and hereby admit that I am guilty to the charge.
- (f) I waive my right to make the State prove each and every element of the offense charged beyond a reasonable doubt.
- (g) I waive my right to have a unanimous jury verdict to convict me.

I have discussed my constitutional right to a jury trial with my attorney. I understand my rights, and hereby acknowledge and waive all the rights listed in paragraph 10a through 10g.

B. E.
Defendant's initials

SULLIVAN, GORMAN & PERKINS
ATTORNEYS AT LAW
205 26TH STREET, SUITE 34
BAMBERGER SQUARE BUILDING
OGDEN, UTAH 84401

STATE OF UTAH V. EDWARDS - Case No. 891706590
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11. I understand that by pleading guilty that there is no appellate review of any lawful sentence imposed under a plea of guilty.

12. No agreements have been reached, and no representations have been made to me as to what the sentence will be.

I understand that sentencing is left to the judge, and that the State and defense cannot bargain concerning the sentence.

B.E.
Defendant's initials

13. I know that under the Laws of Utah, the possible maximum sentence that can and may be imposed upon my plea of guilty to the charge identified on page two of the agreement, are set out in paragraph three above. I also know that if I am on probation, parole, or awaiting sentencing upon another offense of which I have been convicted or to which I have plead guilty, my plea in the present action may result in consecutive sentences being imposed upon me.

14. I know that under a plea of guilty the Judge may ask me questions about the offense to which the plea is entered.

15. The only plea agreement which has been entered into with the Government is:

That the State will reduce the 2nd degree felony to a 3rd degree felony and dismiss the firearm enhancement. That the State will recommend no jail or prison and recommend that the Defendant be placed on probation. The State would

STATE OF UTAH V. EDWARDS - Case No. 891706590
Statement in Advance of Plea

further recommend that the Defendant be ordered into a counseling program which may be supervised by the District Court or Juvenile Court. The State would join with the Defendant in a motion for 402 treatment at time of sentencing.

Steven V. Major
STEVEN V. MAJOR
Attorney for Plaintiff

B.E.
Defendant's Initials

16. I have a right to ask the Court any questions I wish to ask concerning my rights, or about these proceeding and the plea.

* * * * *

I make the following representations to the Court:

1. I am 18 years of age. My education consists of 11 years. I can read and understand English.
(can - cannot)

2. No threats or promises of any sort have been made to me to induce me or to persuade me to enter this plea.

3. No one has told me that I would receive probation or any other form of leniency because of my plea.

4. I have discussed the case and this plea with my lawyer as much as I wish to.

5. I am satisfied with my lawyer.

6. My decision to enter this plea was made after full and careful thought, with the advice of counsel, and with a full understanding of my rights, the facts and circumstances of the

STATE OF UTAH V. EDWARDS - Case No. 891706590
Statement in Advance of Plea

case and the consequences of the plea. I was not under the influences of any drugs, medication, or intoxicants when the decision to enter the plea was made, and I am not now under the influences of any drugs, medication, or intoxicants.

7. I have no mental reservations concerning the plea.

DATED this 24TH day of January, 1990.

Brad Edwards
BRAD EDWARDS
Defendant

I certify that I have discussed this statement with the Defendant; that I have fully explained his/her rights to him/her and have assisted him/her in completing this form. I believe that he/she is knowingly and voluntarily entering the plea with full knowledge of his/her legal rights, and that there is a factual basis for the plea.

DATED this 24TH day of January, 1990.

Kevin P. Sullivan
KEVIN P. SULLIVAN
Attorney for defendant

ORDER

The signature of the Defendant was acknowledged in the presence of the undersigned Judge.

STATE OF UTAH V. EDWARDS - Case No. 891706590
Statement in Advance of Plea

Based upon the facts set forth in the foregoing Statement by Defendant in Advance of Plea of Guilty, the Court finds the Defendant's plea of guilty is freely and voluntarily made and it is ordered that Defendant's plea of "guilty" to the charge set forth in the agreement be accepted and entered.

DONE in Court this 24th day of January, 1990.

Rodney J. Page
JUDGE

SULLIVAN, JORDAN & EHRHARDT
ATTORNEYS AT LAW
205 26TH STREET, SUITE 34
BAMBERGER SQUARE BUILDING
OGDEN, UTAH 84401

STATE OF UTAH
COUNTY OF DAVIS
I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF DAVIS COUNTY, UTAH, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

8

THIS 17 DAY OF January, 19 90

BY PAULA CARR, CLERK

FILED IN CLERK'S OFFICE

OCT 30 4 36 PM '92

CLERK OF DISTRICT COURT

BY lb
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY
STATE OF UTAH

BRANDON N. GEARY,,)	
)	SPECIAL VERDICT
Plaintiff,)	
vs.)	
)	
BRAD EDWARDS and,)	Case No. 900747669
CHRISTOPHER ORCHARD,)	
)	
Defendants.)	

MEMBERS OF THE JURY:

Please answer the following questions from a preponderance of the evidence. If you find the evidence preponderates in favor of the issue presented, answer "Yes." If you find the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the evidence preponderates against the issue presented, answer "No." Also, any damages assessed must be proven by a preponderance of the evidence.

1. Was the defendant, Brad Edwards, negligent as alleged by plaintiff?

Yes X No

2. Was Brad Edward's negligence a proximate cause of the injuries sustained by the plaintiff?

Yes X No

3. Was the defendant, Christopher Orchard,
contributorily negligent?

Yes X No

4. Was Christopher Orchard's contributory negligence a
proximate cause of plaintiff's injuries?

Yes X No

5. Was the plaintiff, Brandon Geary, contributorily
negligent, as alleged by the defendant?

Yes X No

6. Was Brandon Geary's negligence a proximate cause of
plaintiff's injuries?

Yes X No X

Ch. Henry

7. Considering the fault of all the parties whom you
have found to be responsible for this incident, what percentage
of fault is attributable to each:

A. Plaintiff (Brandon Geary)	<u>7</u> %
B. Defendant (Brad Edwards)	<u>90</u> %
C. Defendant (Christopher Orchard)	<u>3</u> %
TOTAL	100%

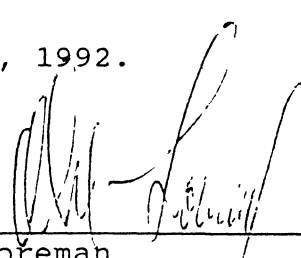
8. If you have answered Questions 2 and 4, "Yes, state the amount of special and general damages, if any, sustained by the plaintiff as a proximate result of the injuries. If such questions were not answered "Yes', do not answer this question.

Special Damages: \$ 36,539.91

General Damages: \$ 30,000.00

TOTAL \$ 66,539.91

DATED this 23rd day of October, 1992.



Foreman